89-936

NO._____

DEC 14 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INF, LTD.,

Petitioner,

v.

SPECTRO ALLOYS CORP.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for Writ of Certiorari and Appendices

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1989 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

QUESTION PRESENTED FOR REVIEW

Does the existence of an unpublished rate agreement constitute a defense to an action at law to recover tariff charges pursuant to 49 U.S.C. sec. 10761(a) and 11706(a)?

LIST OF PARTIES

Petitioner INF, Ltd. (hereinafter "INF") is a Minnesota corporation previously engaged in for-hire motor carrier transportation in interstate commerce. Petitioner is owned by Indianhead Truck Line, Inc., a Wisconsin corporation engaged in for-hire motor carrier transportation in interstate commerce. Respondent Spectro Alloys Corp. (hereinafter "Spectro") is a Minnesota corporation engaged in the purchase and sale of scrap metal and alloys.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction Basis	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	3
A. THE RULING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT	3
B. THE FEDERAL COURTS ARE IRRECONCILABLY SPLIT ON THE CONSTRUCTION AFFORDED THE INTERSTATE COMMERCE ACT	12
C. THE OPINION BELOW IS INCONSISTENT WITH THE INTENT OF CONGRESS AS EXPRESSED IN THE MOTOR CARRIER ACT OF 1980	12
CONCLUSION	14
APPENDIX A	A-1
APPENDIX B	A-10
APPENDIX C	A-11
APPENDIX D	A-17
APPENDIX E	A-24
APPENDIX F	A-38

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908) 10
Baldwin v. Scott County Milling Co., 307 U.S. 478, 484-85 (1939) 11
Inman v. Olin Corp., 807 F.2d 117 (8th Cir. 1986) .. 10
In re Total Transp., Inc., 84 Bankr. 590 (D. Minn. 1989) 12
Louisville & N.R.R. vs. Central Iron & Coal, 259 U.S. 59, 65 (1924) 11
Louisville & N.R.R. v. Maxwell, 237 U.S. 94, 97 (1915) 3, 10, 11
Louisville & N.R.R. v. Rice, 247 U.S. 201, 202 (1918) 11
Maislin Industries & U.S., Inc. v. Primary Steel, Inc., 879 F.2d 400 (8th Cir. 1989) 9, 10, 12
Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989) 9, 12
Missouri Pac. R.R. v. Rutledge Oil Co., 669 F.2d 557 8th Cir. 1982) 10
Mohasco Industries, Inc. v. Acme Fast Freight, Inc., 491 F.2d 1082, 1084 (5th Cir. 1974) 9
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 6
New Haven R. R. v. I.C.C., 200 U.S. 361, 391 (1906) 4
Orschelin Brothers Truck Lines, Inc. v. Zenith Electric Corp., 708 F.Supp. 845 (D. N.D. Ill. 1988) 12
Paulson v. Greyhound Lines, Inc., 804 F.2d 506 (8th Cir. 1986) 10
Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) 6
Southern Pacific Transp. v. Commercial Metals Co., 456 U.S. 336, (1982) 11
Square D. Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 106 S.Ct. 1922 (1986) 11, 12, 13

Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 358 (1907) 8
Thurston Motor Lines vs. Jordan K. Rand, 460 U.S. 533 (1983) 9, 11
T.I.M.E., Inc. v. United States, 359 U.S. 464, (1959) 4, 7, 8
United States v. Associated Transp. Co., 505 F.2d 366, 369 (D.C. Cir. 1974) 9

Statutes:

28 U.S.C. sec. 1254(1) 2
49 U.S.C. sec. 10701(a) 2, 4, 6, 8
49 U.S.C. sec. 10704(b)(1) 7
49 U.S.C. sec. 10704(b)(2) 7
49 U.S.C. sec. 10761(a) 2, 3, 4, 5, 6, 7, 8, 12, 14
49 U.S.C. sec. 10761(b) 7
49 U.S.C. sec. 11705(b)(3) 7, 9
49 U.S.C. sec. 11706(a) 3, 6
49 U.S.C. sec. 11706(c)(2) 9
49 U.S.C. sec. 11901 8
49 U.S.C. sec. 11902 8
49 U.S.C. sec. 11903 8
49 U.S.C. sec. 11904 8

Miscellaneous:

H.R. Rep. No. 1069, 96th Cong., 2d Sess. reprinted U.S. Cong. & Admin. News Service, 96th Cong. at 2292 13

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 881 F.2d 546 and is reprinted at Appendix A. The unreported order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Suggestion for Re-hearing is reprinted at Appendix B.

The order of the United States District Court for the District of Minnesota (Murphy, J.) granting summary

judgment for Petitioner, is unreported and is reprinted as Appendix C. The order of the United States District Court (Murphy, J.), referring proceedings to the Interstate Commerce Commission, is reported at 651 F. Supp. 1405 and is reprinted as Appendix D. The advisory opinion of the ICC is not reported and is reprinted as Appendix E.

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Eighth Circuit was dated, filed and entered on August 3, 1989. A suggestion for rehearing en banc was denied on September 15, 1989. This court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

49 U.S.C. sec. 10701. Standards for Rates, Classifications, Through Routes, Rules, and Practices

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable. . . .

49 U.S.C. sec. 10761. Transportation prohibited without tariff.

(a) Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a traiff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the traiff. . . .

STATEMENT OF THE CASE

INF is a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). INF operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. secs. 10761(a) and 11706(a), INF undertook to recover freight charges from Spectro by filing a civil action in the Minnesota state trial court system. Ultimately, the action was removed to the United States District Court for the District of Minnesota, where the Honorable Judge Diane Murphy referred consideration of issues to the ICC. The ICC found that Spectro and INF had negotiated a lower unfiled rate and that INF should be precluded from collecting its lawful tariff charges. Upon cross-motions for summary judgment, Judge Murphy rejected the ICC's opinion and granted judgment in favor of INF and against Spectro. Judge Murphy's grant of summary judgment to INF was reversed by the U.S. Court of Appeals for the Eighth Circuit. On September 15, 1989, the Court of Appeals denied INF's suggestion for rehearing en banc.

REASON FOR GRANTING WRIT

A. The Ruling Below Conflicts With Prior Decisions of This Court.

Under the regulatory scheme adopted by Congress and embodied in the Interstate Commerce Act, motor common carriers and shippers may not deviate from the filed tariff rate under any pretext. *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rule of law is strictly applied because otherwise the Act's underlying purposes could be circumvented through judicially or administratively created

exceptions favoring the interests of individual shippers and their secret rate deals. As this court held on the eve of the new Act to Regulate Commerce of 1887:

> It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to seek equality of rates as to all and to destroy favoritism, the last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.

New Haven R. R. v. I.C.C., 200 U.S. 361, 391 (1906). By reversing the District Court, the Court of Appeals below held that illegal, unpublished rates can be given legal effect as long as the ICC determines the collection of the filed rate to be an "unreasonable practice". The Court of Appeals improperly found that the ICC's jurisdiction over carrier practices set forth in section 10701(a) empowers the Commission to declare the requirements of section 10761(a) unreasonable. However, section 10701(a) is only a general policy section that grants the Commission no remedial power at all. *T.I.M.E., Inc. v. United States*, 359 U.S. 464, (1959). Moreover and fundamentally, the practice found to be unreasonable by the Commission is the collection of lawful tariff charges. This alleged "carrier practice" is actually a statutorily mandated requirement. See 49 U.S.C. sec. 10761(a). As recognized by the District Court, below this strict rule of law derives from the statute itself and Supreme Court construction thereof, and neither the Commission nor the courts have authority to alter it.

The question of law presented is not whether it is un-

reasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction over carrier "practices". The question is whether a voluntary, mistaken, or intentional deviation from a tariff rate nullifies the requirements of 49 U.S.C. sec. 10761(a) so as to defeat a motor common carrier's right and duty to collect its lawful tariff charges. Neither the ICC nor the courts, acting either individually or in concert with one another, have the authority to waive the requirements of section 10761(a) on the basis of secret agreements that result in departure from lawful tariff rates.

The Court of Appeals below incorrectly found that an equitable defense to an action at law to collect the filed rate could exist when the ICC after court referral declared the collection of the applicable and lawful filed rate to be an unreasonable practice. 881 F.2d 546, 548. This contention is based on the erroneous assertion that, absent a determination by a U.S. District Court that the ICC's opinion is not supported by substantial evidence, an advisory opinion by the ICC ignoring the tariff collection requirements of the Act is binding upon the reviewing court. Thus, the question presented is the correctness of the Court of Appeal's resolution of a legal issue, namely whether or not the ICC may allow assertion of an equitable defense under the guise of an "unreasonable practice" in an action at law to collect tariff charges.

The Court of Appeals held that courts must grant equitable defenses where the ICC concludes that in particular circumstances the filed rate doctrine is unfair.[1] The ICC stated that it will balance the equities involved in determining whether or not the filed rate doctrine is fair under

[1]Unless the reviewing court holds that the ICC's findings are arbitrary, capricious or not supported by substantial evidence. 881 F.2d 546, 550.

the circumstances.[2] However, the Act provides that the courts have exclusive jurisdiction over actions to recover motor carrier tariff charges. 49 U.S.C. sec. 11706(a). As discussed above, courts cannot allow equitable defenses by giving legal effect to rate agreements prohibited by statute. By the same token, the ICC has no authority to order the waiver of motor carrier undercharges, as the Commission itself concedes.[3] Nor does it have the authority to waive the tariff filing and adherence requirements of section 10761(a). *Regular Common Carrier Conference v. United States,* 793 F.2d 376, 379 (D.C. Cir. 1986). Notwithstanding these statutory prohibitions, the Court of Appeals found that the ICC may, upon referral from a court, circumvent the filed rate doctrine. However, a court and an agency cannot act in concert through the referral process to accomplish indirectly that which neither can do directly. Cf. *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.,* 341 U.S. 246, 254 (1951). The Commission's opinion did not address an issue entrusted to its expertise, but merely decided a question that has already been determined by this Court for decades. Nevertheless, the Court of Appeals contends that the ICC, through its self-proclaimed jurisdiction over carrier practices under 49 U.S.C. sec. 10701(a), can determine that the requirements of section 10761(a) are unreasonable and should be waived. In effect, the court found that the Act may be used to defeat itself. This is not the law. The "practice" condemned by the Commission is the statutory requirement of adherence to lawful tariff charges. If Congress desired to give the Commission author-

[2]n. 3, p. 5, ICC decision below.

[3]The Court of Appeals on the other hand, erroneously suggests that the ICC has such power. 881 F.2d 546, 550.

ity to relieve motor common carriers from the requirements of section 10761(a), it could have done so, just as it did with respect to motor contract carriers. See 49 U.S.C. sec. 10761(b) (authorizing the Commission to relieve contract carriers from the requirements of section 10761(a)). In light of the comprehensive review of this area of the law by Congress in 1980, it cannot be seriously argued that the Commission has been granted power by section 10701-(a) to relieve common carriers of the requirement to strictly adhere to filed tariffs.

Part II of the Act, originally enacted as the Motor Carrier Act of 1935, did not empower the Commission or the courts to determine reasonableness of rates on past shipments or afford shippers a cause of action or defense for past violations of the Act by a carrier. *T.I.M.E., Inc., supra,* at 469.[4] Ultimately, a compromise was struck in the 89th Congress which created for the first time a justiciable legal right to reparations against motor carriers based upon their duty to establish and maintain just, reasonable and non-discriminatory rates; however, it denied the Commission power to compel reparations and instead vested such power in the courts. *Compare* 49 U.S.C. sec. 10704(b)(1) *with* sec. 10704(b)(2).

The sole remedy of a shipper with respect to *rates* on past shipments is to commence a civil action against a carrier for reparations. Thus the Act affords shippers a remedy for "damages resulting from the imposition of rates for transportation or service the Commission . . . finds in violation of the Act". 49 U.S.C. sec. 11705(b)(3). There-

[4]"Language of this sort in a statute . . . creates only a 'criterion for administrative application in determining a lawful rate' rather than a "justiciable legal right' ".

fore the involvement of the Commission is purely ancillary to an action at law for reparations, namely to determine whether the filed tariff rates were unjust, unreasonable, discriminatory, prejudicial or preferential. Even after the Commission makes such determination, it is the exclusive prerogative of the court whether or not to follow the Commission's findings. Thus the Act, after revision in light of *T.I.M.E., Inc.*, makes clear that the shippers and carriers must look only to the filed tariff to determine the rights of the parties unless the tariff or rates contained therein are found to be unreasonable. In the matter at bar, there was no finding by the ICC that INF's rates were either discriminatory or unreasonable.

The proposition that the Act permits either the Commission or a court, or both, to ratify illegal rate agreements turns the statute on its head. If true, then the ICC would have the power, through the courts, to use section 10701(a) to nullify the requirements, prohibitions, and civil and criminal sanctions provided by sections 10761(a), 11901, 11902, 11903, 11904 of the Act. Explaining the statutory scheme with respect to the filed rate doctrine, this Court has warned that "the act cannot be held to destroy itself." *Texas & P.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 358 (1907).

Sections 10761(a) and 10701(a) of the Act are not mutually exclusive. Rather, they constitute the regulatory scheme Congress believed necessary to ensure that all shippers utilizing motor common carriers pay the full tariff charge. The ICC's "remedy", on the other hand, undermines the statutory scheme by condoning special rate agreements permitting individual shippers — such as Spectro — to retain the benefit of a secret rate agreement. Validation of

such agreements results in discrimination against those shippers who abide by the law by paying the filed tariff rate.

The rigid requirements of the filed rate doctrine reflect the will of Congress and only that body may change the statutory mandate. *Thurston Motor Lines vs. Jordan K. Rand,* 460 U.S. 533 (1983). The exceptions Congress has permitted are narrow and carefully delineated. For example, the reparations remedy provided in 49 U.S.C. secs. 110705-(b)(3) and 11706(c)(2) permits challenges to the lawfulness of tariff rates on past shipments. Even then, the shipper must first pay the tariff rate before it can be challenged as unreasonable. It is the sole and exclusive remedy for excessive charges on past motor carrier shipments. *Matter of Caravan Refrigerated Express, Inc.,* 864 F.2d 388 (5th Cir. 1989). *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.,* 491 F.2d 1082, 1084 (5th Cir. 1974), and *United States v. Associated Transp.,* 505 F.2d 366, 369 (D.C. Cir. 1974).

In no case cited by the Court of Appeals in the opinion below was an unlawful rate agreement of the parties allowed to supplant a lawful tariff rate.[5] The Supreme Court and circuit cases cited in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 879 F.2d 400, simply stand for the proposition that the Commission can find a tariff provision unreasonable. No such finding was made in the proceeding below. Instead, the court in *Maislin* found that an otherwise lawful tariff rate may not be collected. Moreover, in each case cited, the ultimate result was payment by the shipper of a published tariff rate, albeit a different one than that advanced by the carrier. In none of the cases cited by the

[5]With the exception of *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 879 F.2d 400 (1989), decided a few weeks prior to the opinion below.

court below or in *Maislin, supra,* was an unpublished, negotiated rate allowed to apply in lieu of a filed rate. Furthermore the Court of Appeals made no attempt to reconcile the decision below with its earlier decisions affirming the rule of strict adherence to filed tariffs. *Compare Maislin, supra,* and the opinion below *with Inman v. Olin Corp.,* 807 F.2d 120 (8th Cir. 1986); *Paulson v. Greyhound Lines, Inc.,* 804 F.2d 506 (8th Cir. 1986); *Missouri Pac. R.R. v. Rutledge Oil Co.,* 669 F.2d 557 (8th Cir. 1982). If the Court of Appeals decision is permitted to stand, Spectro Alloys will have entirely circumvented the application of legal tariff rates.

The court below ignored over eighty years of Supreme Court precedent on this question of law. This Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. v. Maxwell,* 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* [Emphasis supplied].

In *Armour Packing Co. v. United States,* 209 U.S. 56, 81 (1908), the Court explained the rationale for the rigid rule of the filed rate doctrine:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement,

> then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

This Court has invariably applied this rule of law when it has addressed the issue of adherence to lawful common carrier rates. See, e.g., *Thurston Motor Lines v. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (carrier's claim is predicated on the tariff, not an understanding with the shipper); *Southern Pacific Transportation v. Commercial Metals Co.*, 456 U.S. 336, (1982) (equitable defense of carrier's violation of ICC credit regulations rejected); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N.R.R. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), this Court reaffirmed the continuing validity of the filed rate doctrine and its attendant prohibition against any departures from the tariff rate citing, among other cases, *Maxwell*. 476 U.S. at 416-417. Although *Square D* involved an antitrust challenge to filed rates, attempts to distinguish it fail in view of this Court's specific language stating that the filed tariff defines the rights of the shipper and carrier and cannot be varied by tort or contract. 476 U.S. 416-417. Since the decision of the United States Court of Appeals below conflicts with prior decisions of the U.S. Supreme Court as well as other U.S. Circuit Courts of Appeals, a writ of certiorari should issue.

B. The Federal Courts are Irreconcilably Split on the Construction Afforded the Interstate Commerce Act

Presently only two circuit courts of appeals, namely the Fifth Circuit and the Eighth Circuit, have addressed this question since the Commission issued its Ex Parte MC-177 policy statement. These circuit courts reached opposite results. *Compare Maislin, supra,* and *INF* below *with Matter of Caravan, supra.* Presently appeals are pending on this question in the First, Second, Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits. These cases are listed in Appendix F hereto. Furthermore the U.S. District and Bankruptcy Courts have resolved this question in diverse ways. See listings of U.S. District and Bankruptcy Court decisions in *In re Total Transp.,* 84 Bankr. 590 (D. Minn. 1989) and in *Orschelin Brothers Truck Lines, Inc. v. Zenith Electric Corp.,* 708 F. Supp. 845 (D. N.D. Ill. 1988).

Due to the divergence of resolution by the Circuit Court and District Courts, this court should grant the petition and resolve the issues of interpretation of the Act. Resolution of this question would facilitate judicial economy and uniformity in application of the Interstate Commerce Act.

C. The Opinion Below is Inconsistent with the Intent of Congress as Expressed in the Motor Carrier Act of 1980

The ICC's policy upon which the Court of Appeals relied admittedly results from any change in the statute but rather from a less regulated atmosphere created by the Motor Carrier Act of 1980. This, however, is inconsequential for the purpose of inferring any change in the intent of Congress.[6] As this Court stated in *Square D, supra,* Con-

[6]Indeed when Congress carefully re-examined this area in 1980, it did so in light of Section 10761(a) and substantial precedent interpreting that section of the statute. At that time Congress left intact the filed rate requirement for common carriers.

gress in 1980 carefully re-examined what has been settled law for nearly three quarters of a century and did not see fit to change it. Neither the Court of Appeals nor the ICC in its policy statement have pointed to any statutory provision or legislative history indicating a specific congressional intent to overturn the filed rate doctrine. Indeed, they are unable to do so for good reason. To be sure, the legislative history indicates that when Congress was overhauling the Interstate Commerce Act in 1980, ICC discretion was eliminated. H.R. No. 1069, 96th Cong. 2d Sess. reprinted at U.S. Cong. and Admin. News Service, 96th Cong. at 2292. Senator Cannon, one of the sponsors of the Motor Carrier Act of 1980 stated:

> This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated. 126 Cong. Rec. 7777 (1980).

Thus, it is clear from both the statute and the legislative history that had Congress intended to change the requirement of strict adherence to tariffs it would have done so. As the *Square D* Court noted, "harmony with the general legislative purpose is inadequate for that formidable task." 476 U.S. 420.

CONCLUSION

The Court of Appeals erred in relying on an ICC advisory decision which is contrary to law. The decision below and the ICC opinion on which it relies subverts a Congressionally fashioned regulatory scheme by allowing motor common carriers and their customers to freely negotiate prices without complying with the requirements of section 10761(a). Congress has neither eliminated nor altered the strict tariff adherence requirements of the Act for motor common carriers; and until it does, equitable defenses are statutorily barred in actions at law such as the present proceedings.

The Petition of INF should be granted therefore to resolve the conflicting treatment of the filed rate doctrine among the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Bankruptcy Courts. Accordingly, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 88-5324
INF, Ltd.,

Appellee,

v.

Spectro Alloys Corp.,

Appellant.

Submitted: January 11, 1989
Filed: August 3, 1989

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

INF, Ltd., a freight carrier, sued Spectro Alloys Corp., a metal products manufacturer, to collect the difference between the rate quoted by INF and the higher applicable tariff rate filed with the Interstate Commerce Commission. Spectro now appeals from an adverse summary judgment in which the district court held that, under the "filed rate doctrine," Spectro's reliance on the quotation of a tariff by INF did not excuse Spectro from paying the applicable tariff rate. The district court had referred to the ICC the question of whether INF would be engaging in an unreasonable practice in requiring Spectro to pay the difference

between the rate INF charged and the filed tariff rate. By a three-two vote, the ICC held that INF's collection of undercharges would be an unreasonable practice in violation of 49 U.S.C. § 10701. The district Court held that under 49 U.S.C. § 10761, Spectro must pay and INF must collect the applicable rate on file with the ICC, regardless of the ICC's determination that such a practice is unreasonable. As we hold that the district court erred by strictly adhering to the tariff requirements of section 10761 when the ICC has determined that to impose the filed tariff rate would be unreasonable, we reverse.

In 1983, INF solicited business from Spectro to transport Spectro's goods. Although INF knew that the commodities it was to ship for Spectro were aluminum and aluminum alloy, INF quoted and Spectro agreed to pay a rate based upon the "iron and steel" tariff that INF had filed with the ICC. During 1983 and 1984, INF made 124 shipments for Spectro, for which Spectro paid this iron and steel rate. In December, 1984, INF's parent corporation filed for reorganization under Chapter 11 of the Bankruptcy Code. Auditors appointed by the bankruptcy court concluded that INF had improperly charged Spectro with the iron and steel rate instead of the "freight, all kinds rate." According to the auditors, Spectro was undercharged by $22,460.70.

INF brought this action seeking payment of the undercharges. Upon Spectro's motion, the district court referred the case to the ICC to determine whether INF's demand for payment of the alleged undercharges constituted an "unreasonable practice" under 49 U.S.C. § 10701.

In a three-two vote, the ICC determined that the iron and steel rate applied by the parties in the transaction

occurred as a result of negotiations between the parties; INF solicited Spectro's business and quoted what it believed to be competitive rates, and Spectro accepted and paid the quoted rate. The ICC also found that Spectro reasonably relied on INF's rate quotation. Relying on its decision in *National Indus. Transp. League — Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177*, 3 I.C.C.2d 99 (1986), (hereafter *Negotiated Rates*), which held that the ICC could consider equitable defenses to determine if the collection of undercharges is a reasonable practice, the ICC concluded that it would be an unreasonable practice to require Spectro to pay the difference between the appropriate tariff rate (the freight, all kinds rate) and the iron and steel rate. Two commissioners dissented, arguing that the *Negotiated Rates* policy did not apply to this situation as the case involved the application of an incorrect published rate, not a negotiated unpublished rate.

On motion by both parties for summary judgment, the district court held that Spectro was not excused from paying the full amount of the applicable freight, all kinds rate. The court reasoned that it was bound by the "filed rate doctrine," an interpretation of 49 U.S.C. § 10761 which mandates that carriers collect the rate published in their tariffs. Recognizing that the ICC could nevertheless evaluate equitable considerations in determining whether a carrier's rate or practice was reasonable, the district court held that it did not have the power to consider such equitable defenses. Thus, the district court determined that it could not follow the ICC decision because it was required to adhere strictly to the filed rate doctrine.

We first confront the issue of whether the question presented here — whether INF's practice of assessing and rebilling Spectro for the filed tariff rate constituted an unreasonable practice — was properly within the primary jurisdiction of the ICC. INF contends that the issue was not within the ICC's primary jurisdiction as it is a question of law and within the competency of the judiciary. INF claims that the ICC decision constituted only an advisory opinion not binding on the district court. In its order referring the issue to the ICC, the district court cited *Seaboard Sys. R.R., Inc. v. United States,* 794 F.2d 635, 638 (11th Cir. 1986), for the proposition that "[d]etermining whether a carrier's practice is unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." The district court recognized that the ICC historically had refused to order the waiver of undercharges, but that the ICC now acknowledges that it may consider equitable defenses to 49 U.S.C. § 10761, which requires a motor carrier to collect the rate filed with the ICC. *See Negotiated Rates,* 3 I.C.C.2d 99.

In *Maislin Indus. & U. S., Inc. v. Primary Steel, Inc.,* No. 88-2267 (8th Cir. July 17, 1989), which was argued on the same day as this case and presented a similar factual situation, we have decided that the reasonableness of a carrier's billing practices and efforts to collect undercharges are matters involving the special expertise of the ICC and are therefore within the ICC's jurisdiction. *Maislin,* slip op. at 5-7. *See also Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.,* 685 F.2d 255, 259 (8th Cir. 1982); *Delta Traffic Serv., Inc. v. Marine Lumber Co.,* 683 F. Supp. 754 (D. Or. 1987); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores, Inc.,* 670 F. Supp. 644 (W.D.N.C. 1987). *Maislin* dictates that we affirm the dis-

trict court's conclusion that the reasonableness of INF's billing practice was properly within the ICC's primary jurisdiction.

We next decide whether the district court erred in enforcing the filed rate doctrine, disregarding the ICC decision which held that requiring Spectro to pay the difference between the applicable filed rate and the iron and steel rate would be unreasonable under 49 U.S.C. § 10701. While the district court, citing *Negotiated Rates,* recognized that the ICC has the power to consider equitable defenses and to declare a billing practice unreasonable, it held that it must strictly apply the filed rate doctrine and disallow Spectro's equitable defense, despite the ICC's decision. The court relied on *Louisville & Nashville R.R. Co. v. Maxwell,* 237 U.S. 94, 97 (1915), where the Supreme Court established the filed rate doctrine in holding that reliance on a carrier's misquotation of price does not excuse the purchaser from paying the correct rate.

Again, we rely on *Maislin,* where we held that the filed rate doctrine does not bar the ICC from applying equitable defenses to determine whether the collection of undercharges is an unreasonable practice in violation of 49 U.S.C. § 10701. *Maislin,* slip op. at 7-12. In *Maislin* we analyzed the filed rate doctrine, and recognized the authority of the ICC to balance section 10761(a), mandating collection of the tariff rates, with section 10701, requiring that rates be reasonable. We concluded that the ICC had the authority to change its policy concerning the filed rate doctrine, and that its policy change was reasonable. *Maislin,* slip op. at 11-12. The district court in this case did not know of our holding in *Maislin.* Accordingly, we conclude that the district court erred in ruling that the filed rate doctrine requires collection of the undercharges,

in spite of the ICC's decision that to do so would be unreasonable.

Although the district court recognized that the Eleventh Circuit had affirmed an ICC decision which held that collection of undercharges was unreasonable, *see Seaboard*, 794 F.2d 634, it held that *Seaboard* did not apply, as it involved the direct appeal of an ICC order rather than the referral of the issue to the ICC by a district court. We differ from this conclusion. *Seaboard* held that a court may not consider equitable defenses, but plainly approved the ICC's consideration of equitable defenses in determining whether or not a practice was unreasonable. 794 F.2d at 638. There is a clear division between the responsibilities of the district court and the ICC. The ICC may render an opinion as to whether it would be an unreasonable practice for the carrier to collect the undercharges, and the district court in reviewing this decision may then, if it concludes it is appropriate, fashion the necessary remedy. This does not require the court itself to apply the equitable defenses, but simply to accept or reject the ICC's finding that there was an unreasonable practice.

INF argues that the question in this case, whether the filed rate doctrine bars equitable defenses, is one of law, and therefore contends that the district court correctly rejected the ICC's decision without determining that it was arbitrary, capricious or unsupported by substantial evidence. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-21 (1966); *see also Erickson Transp. Corp. v. ICC*, 728 F.2d 1057, 1062 (8th Cir. 1984) (per curiam). We, however, do not view the determination of the ICC as one involving only a question of law.[1] In considering whether to find a carrier's practice unreasonable in an action for the collection of undercharges, the ICC has

stated that a decision in favor of a shipper requires findings of these elements: (1) that a rate other than the applicable tariff rate was quoted by a carrier, and that an greement to use that rate was reached, and (2) that the shipper reasonably relied on the quote. *Wakefern Food Corp. v. Southwest Freight Lines, Inc.*, 3 I.C.C.2d 814 (1987). In this case the question as to whether a rate was negotiated presents a close factual question.[2] INF vigor-

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[1]While this case was pending, the ICC issued an opinion in *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, Ex Parte MC-177*, 5 I.C.C.2d 623 (1989), which was decided on June 14 and served on June 29. The ICC states that its unreasonable practice findings are "legal, rather than purely equitable determinations and derive from its obligation under § 10701 to ensure that practices * * * are reasonable." *Id.* at 628. This language addresses the distinction between legal as opposed to equitable determinations, but our discussion points to the ultimate legal conclusion under the statute encompassing the factual findings that are involved in reaching this ultimate determination.

[2]The ICC order recited the facts concerning the negotiation as follows:

> The evidence here discloses that INF's president solicited the traffic and quoted what he knew to be a competitive rate for the traffic. Spectro accepted and paid for the transportation services at the quoted rates. Spectro relied on INF to implement properly the quoted rates. INF's failure to do so, despite Spectro's lack of vigilance, should, in these circumstances, preclude INF's later collection of undercharges. There is absolutely no evidence that Spectro agreed to pay any more than the amount INF originally quoted and billed for each shipment. There is no evidence that INF ever demanded additional amounts over the amounts it billed at any time during its business relationship with Spectro. The carrier's president at the time of the negotiations and transportation clearly states that the traffic could not have moved competitively under the freight all kinds rates. We find that Spectro reasonably believed that the amounts quoted and billed by INF were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Spectro and INF, and that, since full payment was made by Spectro, INF is equitably entitled to collect no more.
>
> 3. *Summary*. The evidence here shows that INF's president, Mr. Freese, quoted rates to Spectro in order to induce it to tender the aluminum traffic and Spectro agreed to tender its aluminum shipments at those rates. Spectro, moreover, reasonably relied on Mr. Freese and his quotation in view of the fact that he was the firm's top management official. It would be inequitable to ignore proven rate negotiations and Spectro's reasonable reliance on the assurances of INF's president simply because inflexible adherence to the "filed rate doctrine" would suggest otherwise. In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Spectro to pay undercharges for the difference between the negotiated rates and the tariff rates.

ously claimed that the parties simply misapplied the iron and steel tariff to aluminum products. To the contrary, Spectro argued that the rate applied was negotiated. The ICC determined the threshold issues that the amounts quoted were "reached as the result of negotiations," and that Spectro was entitled to rely upon INF's quotation. It then proceeded to the ultimate statutory issue, which involves inherently factual inquiries, and found that "it would be an unreasonable practice now to require Spectro to pay undercharges." These findings channel further consideration of this case.

The ICC's factual finding that the rate charged was negotiated and its ultimate determination that the practice of collecting undercharges is unreasonable may not be set aside unless the ICC's findings are arbitrary, capricious, or unsupported by substantial evidence. The district court did not reach this issue because INF, in arguing that the issue presented was purely legal, did not assert such an argument, nor does it do so in this appeal. The district court's opinion may be read as accepting INF's position that the wire and tariff was misquoted and misapplied to aluminum products. In doing so, the court appears to ignore the finding of the ICC that there was a negotiated rate. If failed, however, to use the only proper legal basis for rejecting an ICC finding, namely, that it was arbitrary, capricious or unsupported by substantial evidence. *See Erickson Transp.*, 728 F.2d at 1063 ("the reviewing court is not to substitute its conclusions for those of the Commission.") Thus, there is no basis for the district court to reject the ICC's decision that the practice of collecting undercharges was unreasonable.

The district court stated that even if it were allowed to depart from the filed rate doctrine such a departure should

not be premised on a "closely divided administrative decision in this fluctuating area of law." We differ with the district court's conclusion. Administrative bodies as well as appellate courts may resolve controversies by a one vote margin.[3] In such instances, the majority decision controls. As we read the dissenting opinions, both commissioners take issue with the majority's factual finding that there was a negotiated rate and that Spectro reasonably relied on the rate, and then argue that *Negotiated Rates* was not intended to be applied so broadly as to cover the misquotation of a tariff rate. We believe, however, that because the dissenting commissioners in essence base their argument on factual findings of the majority with which they differ, the district court should have considered and applied the majority findings unless it rejected them as arbitrary, capricious, or unsupported by substantial evidence.

In sum, we conclude that the district court erred in holding that because it was bound by the filed rate doctrine, it could not adopt the ICC's decision. Accordingly, as no issue was raised other than this legal question we have decided adversely to INF, we reverse the district court's order granting summary judgment in favor of INF and remand the case to the district court with instructions to grant Spectro's motion for summary judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3]News sources report that the United States Supreme Court decided from 31 to 34 cases on a five-four basis in the term just ended, depending on which newspaper article is read. We need not make our own count of the decisions, but it is evident that a substantial percentage of cases are so decided and that this does not detract from their finality.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-5324-MN

INF, Ltd.,

Appellee,

vs.

Spectro Alloys Corp.,

Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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Appellee's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 15, 1989.

Order Entered at the Direction of the Court:

Robert D. St. Vrain
Clerk, United States Court of Appeals,
Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil 4-86-705
NF, Ltd.,

Plaintiff,

vs.

Spectro Alloys Corp.

Defendant.

MEMORANDUM OPINION
AND ORDER

Paul O. Taylor, Esq., Suite 520, Metro Financial Center, 1550 East 79th Street, Minneapolis, MN 55425, appeared for plaintiff.

James R. Scoggin, Esq., Harvey, Thorfinnson & Scoggin, 6640 Shady Oak Road, Suite 400, Eden Prairie, MN 55344, appeared for defendant.

On January 30, 1987, the court granted the motion of defendant Spectro Alloys Corp. (Spectro) to refer this case to the Interstate Commerce Commission (ICC) to determine whether it would be an unreasonable practice to require Spectro to pay "undercharges" for the difference between the tariff rate that the parties believed was appropriate and the tariff rate that INF now says is correct. 651 F. Supp. 1405 (D. Minn. 1987). In a decision issued on

February 23, 1988, the ICC, by a 3-2 vote, determined that it would be an unreasonable practice. *INF, Ltd. — Petition for Declaratory Order No. (MC-C-30041)*, 1988 ICC LEXIS 23 (Feb. 23, 1988). Defendant Spectro now moves for summary judgment on the ground that the ICC's decision establishes the validity of its equitable defenses. Plaintiff has filed a cross-motion for summary judgment.

Plaintiff INF, Ltd. (INF) was formerly in the freight handling business. Defendant Spectro manufactures and distributes metal products. It appears that INF solicited business from Spectro and quoted an "iron and steel" tariff for the shipment of Spectro's aluminum commodities. During 1983 and 1984, INF made 124 shipments for Spectro, for which Spectro paid the "iron and steel" rate. In December 1984, INF's parent corporation filed a Chapter 11 reorganization and auditors concluded that INF had charged Spectro the wrong rate. INF now claims that the correct rate was the "freight, all kinds" tariff and that Spectro was undercharged by $22,460.70.[1]

In granting defendant's motion to refer this case to the ICC, the court noted "the ICC's intention to broaden the use of its authority to determine what is reasonable' "[2]

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[1]INF now concedes that approximately $5000 of the undercharges are barred by the statute of limitations established by 49 U.S.C. § 11706. Plaintiff's Memorandum at 1 n. 1. At the hearing, the parties stated that they would be able to agree upon the exact amount of undercharges barred.

[2]Most importantly, the court noted the ICC's decision in *National Indus. Transp. League (NITL) — Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (Ex Parte No. MC-177)*, 1986 Fed. Carr. Cas. (CCH) para. 37,284 (1986) (hereafter *Ex Parte No. MC-177*). There, the ICC announced a major policy change by deciding that the "filed rate" doctrine does not necessarily bar equitable defenses where a negotiated but unpublished rate was agreed upon. That doctrine, discussed *infra*, requires carriers to charge and shippers to pay the exact charges set forth in the published tariffs, with no deviation allowed.

and expressed concern with "'promoting proper relationships between the courts and administrative agencies.'" 651 F. Supp. at 1407 (quoting *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63 1956)). The issue of referral arose, the court stated, "in the context of [a] changing legislative and regulatory scheme." *Id.* at 1407-08.

The ICC determined that INF's quotation of the "iron and steel" rate should preclude its collection of the alleged undercharges. It found that Spectro reasonably relied upon INF's quotation of the tariff and concluded that it would be an unreasonable practice to require Spectro to pay the difference between the rates at this time. Chairman Gradison and Commissioner Simmons dissented, finding that Spectro's reliance was not reasonable.

Defendant Spectro contends that it is now entitled to summary judgment in view of the ICC's decision because "there is no longer any valid claim for INF to pursue." Defendant's Memorandum at 6. Plaintiff INF argues that the ICC had no authority to render an opinion waiving undercharges. It relies upon the dissenting opinions issued by the two Commissioners.

Referral to the ICC under these circumstances allowed the record to be developed fully by permitting the ICC to express its view on the issues in question. Nevertheless, after giving thorough consideration to the ICC's decision, the court determines that it remains bound by the "filed rate" doctrine established by Congress[3] and the Supreme Court. In *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), the Court explained that reliance on a carrier's misquotation of price does not excuse the purchaser from paying the correct rate:

> Deviation from [the applicable rate] is not permitted upon any pretext. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

See also Paulson v. Greyhound Lines, Inc., 804 F.2d 506, 507 (8th Cir. 1986) ("[*Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986),] recently reaffirmed the overriding nature of the tariff in relationships between shippers and carriers.") Neither Congress nor any federal court has seen fit to mitigate the sometimes harsh effects of the filed rate doctrine by allowing equitable defenses.[4] Accordingly, this court must strictly apply the filed rate doctrine and disallow Spectro's equitable defenses, despite the ICC's decision.[5]

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[3]49 U.S.C. § 10761(a) provides in part:

> [A] carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Congress also provided criminal penalties for departures from filed rates. 49 U.S.C. § 11903.

[4]The only authority cited by defendant for the proposition that courts may consider equitable defenses after an ICC finding of unreasonableness on referral is dicta contained in a concurring opinion in a state intermediate appellate court decision. *See G.M.W., Inc. v. Certified Parts Corp.*, 135 Wis. 2d 503, 400 N.W.2d 512, 515 (Wis. Ct. App. 1986) (Sundby, J., concurring). Plaintiff also cites *Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.*, 685 F.2d 255 (8th Cir. 1982), and *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982), but neither case addresses the issue of equitable defenses. Divergence from *Maxwell*, a 73-year-old Supreme Court decision cannot be justified on the basis of such authority.

[5]In *Ex Parte No. MC-177*, the ICC recognized that its determinations would be "advisory" in this context and noted that "[t]he referring court would retain final authority to set the remedy, if any, and review our determination."

In referring the case to the ICC, the court noted *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986). There, the Eleventh Circuit held that the ICC had the authority to consider whether it would be an unreasonable practice for the carrier in question to collect undercharges. However, *Seaboard* was careful to distinguish between consideration of equitable defenses by the ICC and consideration of such defenses by the courts:

> The Commission's action in this case is both justified and within its jurisdiction. It is not contrary to *Maxwell* and related cases, as those dealt only with the *courts'* authority to grant equitable defenses to undercharge actions.

Id. at 638 (emphasis in original). However, *Seaboard* did not concern a referral from a court but rather arose from an administrative complaint filed directly with the ICC. *Seaboard* does not stand for the proposition that a *court* may consider an equitable defense to an action seeking collection of undercharges.[6]

Even if the court were inclined to depart from strict application of the filed rate doctrine, the circumstances of this case would not warrant such a departure. The ICC's decision was issued by a divided Commission, with three Commissioners joining in the decision while two others dis-

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[6]There are several recent court decisions of interest on this point. Some courts that previously referred cases to the ICC have called into doubt the propriety of those referrals. *See, e.g., Observer Transp. Co. v. Service Merchandise Co.*, 1988 WL 49292 (W.D.N.C. May 16, 1988); *Delta Traffic Serv., Inc. v. E. L. Mustee & Sons*, No. C87-1726 (May 12, 1988) (vacating earlier order referring case to ICC). Others have declined to refer cases to the ICC. *See, e.g., Miller v. Armour & Co. (In re Total Transp., Inc.)*, 84 Bankr. 590 598 (D. Minn. 1988) (MacLaughlin, J.) ("[B]ecause [the court] is bound by both statute and Supreme Court precedent to apply the filed rate doctrine it would be unable to accept any advisory opinion by the ICC that a shipper be permitted to avoid the filed rate doctrine through the assertion of equitable defenses.").

sented. Chairman Gradison found that defendant did not reasonably rely upon plaintiff's representations, stating that "[t]here is no reasonable argument that an iron and steel tariff applies to aluminum articles." Commissioner Simmons also dissented and similarly found that any reliance by defendant was not reasonable. Furthermore, Commissioner Simmons added that the *Ex Parte No. MC-177* decision was intended to apply only where a negotiated and unpublished rate was used. By contrast, this case allegedly involved an incorrect published rate. Departure from the historically established filed rate doctrine should not be premised on such a closely divided administrative decision in this fluctuating area of law.[7]

It is now undisputed that the "freight, all kinds" tariff was applicable to the shipments. Since defendant may not assert equitable defenses and because no disputed issue of material fact remains, plaintiff is entitled to judgment as a matter of law. Its motion for summary judgment should therefore be granted.

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment is denied.
2. Plaintiff's motion for summary judgment is granted.

A. The parties shall notify the court as to the amount plaintiff is entitled to recover by July 26, 1988.

Dated: July 8, 1988

/s/ DIANA E. MURPHY
United States District Judge

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[7]The ICC is continuing to refine its policy announced in *Ex Parte No. MC-177. See NITL — Petition for a Declaratory Order on Negotiated Motor Common Carrier Rates (No. MC-C-30090)*, 1988 MCC LEXIS 226 (Apr. 14, 1988) (initiating further study and consideration of proposal to modify *Ex Parte No. MC-177* policy).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

INF, Ltd.,

Plaintiff,

v.

Spectro Alloys Corp.,

Defendant.

ORDER

Civil No. 4-86-705

Plaintiff INF, Ltd., a Wisconsin corporation, brought this action in state court against Spectro Alloys Corp. (Spectro), a Minnesota corporation, seeking approximately $22,500 alleged to be due and owing under a tariff filed with the Interstate Commerce Commission (ICC). Defendant Spectro, asserting diversity and federal question jurisdiction, removed the case to this court. Spectro now asks the court to refer this dispute to the ICC so that it may exercise its primary jurisdiction over the issues raised.[1]

INF was formerly in the business of freight handling. Spectro is and was a manufacturer and distributor of metal products. In 1983 and 1984, INF made 124 shipments for Spectro, which paid the registered rates for steel or iron. Both parties apparently believed the steel or iron rates to

[1]Spectro initially sought only a stay in this court to enable the ICC to act on any proceeding that the parties might bring before it. The parties now appear to agree that referral to the ICC is the appropriate action if there is primary jurisdiction.

be appropriate.[2] In December, 1984, INF ceased all operations on order from its parent corporation, which simultaneously filed for reorganization under Chapter 11 of the Bankruptcy Code. Auditors reviewing INF's records concluded that it had charged an incorrect rate. Rather than the steel or iron rate, they believe INF should have charged a higher rate, that is, the rate for "freight, all kinds."

INF now seeks to collect $22,460.70 in "undercharges." Spectro denies that the rate charged was incorrect. In the alternative, it argues that INF lacked the authority to transport the commodity and assess tariff charges, that INF is estopped from collecting any additional charges, and that demanding additional payments is unreasonable. Spectro also asserts that this court may not properly consider these matters until the ICC has exercised its primary jurisdiction over them. Plaintiff denies that any of the issues in this case are properly within the ICC's primary jurisdiction.

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956). "No fixed formula exists for applying the doctrine . . . . In every case the question is whether the reasons for the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* at 64.

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created

[2]Spectro submits the affidavit of INF's former president, who asserts that the rates charged were proper.

> by Congress for regulating the subject matter should not be passed over. . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-575 (1952). The doctrine has been of special importance in matters relating to transportation, and the Supreme Court has held that the ICC has primary jurisdiction over any matters that "raise issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulating scheme laid down by [the Interstate Commerce] Act." *Western Pacific Railroad*, 352 U.S. at 65; *Iowa Beef Processors, Inc. v. Illinois Central Gulf Railroad Co.*, 685 F.2d 255, 259 (8th Cir. 1982).

The threshold dispute between the parties concerns the applicable rate under the tariff. The ICC's specialized knowledge

> is often necessary to interpret ambiguous terms of a tariff or determine the reasonableness of rates. When words in a tariff are used in a technical sense, or extrinsic evidence is necessary to determine this meaning, the primary jurisdiction of the ICC is invoked. . . . . However, when words are used in an ordinary non-technical sense, involving only questions of law, the issue of tariff construction may be decided by the courts.

Kansas City Southern Railway Co. v. Great Lakes Carbon Corp., 462 F.Supp. 21, 23 (E.D.Mo. 1978) (citations omitted) (construction of term "freight all kinds" not within primary jurisdiction of ICC), *aff'd*, 624 F.2d 822 (8th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 955 (1981); *see also Western Pacific Railroad*, 352 U.S. at 69 (not all matters of tariff construction within primary jurisdiction of ICC). Spectro does not argue that the rates themselves are unreasonable or that the terms of the tariff are technical or understandable only by reference to extrinsic evidence.

Interpreting the meaning of the tariff in this case is well within the "conventional experience of judges." Were it the only issue in this case, referral to the ICC would be inappropriate. *Cf. Inman Freight Systems, Inc. v. Olin Corp.*, Nos. 85-2110/2111, slip op. at 4 (8th Cir. Dec. 2, 1986). Determining whether INF had operating authority to transport the commodities in question is a similarly non-technical task.

Spectro's equitable defenses raise a more challenging question, however. Spectro argues that even if the higher rate should have been charged, it would be an "unreasonable practice" for INF to demand payment for any undercharges given the circumstances of this case. Determining whether a carrier's practice is unreasonable is "the kind of determination that lies in the primary jurisdiction of the commission." *Seaboard Systems Railroad, Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986) (citing *Nader v. Allegheny Airlines*, 426 U.S. 290, 304-05 (1976)).

The ICC requires common carrier such as INF to file their tariffs. 49 U.S.C. §10762(a)(1). Carriers may not charge more or less than the specified rate. 49 U.S.C. § 11903. "Deviation . . . is not permitted upon any pretext."

Louisville & Nashville Railroad v. Maxwell, 237 U.S. 94, 97 (1915). The ICC has traditionally refused to recognize equitable defenses to efforts to collect undercharges. *See Seaboard Systems*, 794 F.2d at 638. The courts have similarly held that equitable considerations "cannot justify a carrier's failure to collect authorized tariff charges, . . . nor can they be invoked as the basis for estoppel to collect such charges." *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978), *quoted in Missouri Pacific Railroad Co. v. Rutledge Oil Co.*, 669 F.2d 557, 559 (8th Cir. 1982).

The ICC does, however, have the authority to order carriers to cease violations of 49 U.S.C. §10701(a). This statute requires that carrier's practices "must be reasonable." In the decision affirmed in *Seaboard Systems*, the ICC acknowledged its historic refusal "to order the waiver of undercharges based on carrier rate misquotations, because granting such relief might lead to intentional 'misquotations' by carriers seeking to discriminate in favor of particular shippers." 794 F.2d at 638. In light of "changed circumstances," however, the ICC held that it would be "an unreasonable practice" to permit belated collection of an undercharge where "there was no evidence that the carrier intentionally or knowingly undercharged, when waiving the undercharges was unlikely to encourage carriers to indulge in intentional discriminatory rate 'misquotations,' and when the shipper relied upon the carrier's continuing conduct in misleading the shipper as to the applicable rate under a confusing tariff." *Id.* The Court of Appeals approved this change of policy. *Id.*

In a recently adopted policy statement addressing a different but related problem, the ICC has stated that "the

filed rate doctrine does not necessarily bar equitable defenses." ICC, Ex Parte No. MC-177, slip op. at 1 (October 14, 1986). *Cf. Inman Freight Systems, Inc. v. Olin Corp.*, Nos. 85-2110/2111, slip op. at 4-5 (8th Cir. Dec. 2, 1986) (distinguishing Ex Parte No. MC-177). The ICC's expressed concern in that case was carriers who quote and bill at negotiated rates lower than those filed and subsequently seek to recover the difference. The ICC rejected a proposed rule which would bind carriers to such negotiated but unpublished rates because of the statutory requirement that rates be published. Drawing upon its authority to "adapt [its] rules and practices to the Nation's needs in a volatile, changing economy," *American Trucking Assoc., Inc. v. Atchinson, Topeka & Santa Fe Railroad Co.*, 387 U.S. 397, 416 (1967), the ICC found that in "particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim for undercharges. . . . [The] filed rate doctrine was not intended to condone or reward carriers . . . where [their] actions may constitute fraudulent business practices." Ex Parte No. MC-177, slip op. at 5.

While neither *Seaboard Systems* nor Ex Parte No. MC-177 is entirely on point, both indicate the ICC's intention to broaden the use of its authority to determine what is "reasonable." Proper concern for "promoting proper relationships between the courts and administrative agencies," *Western Pacific Railroad*, 352 U.S. at 63, leads to the conclusion that this litigation should be stayed so that the ICC may determine whether INF's action is "unreasonable." Under the circumstances of this case, and in the context of the changing legislative and regulatory scheme, this ques-

tion should be referred to the ICC for the exercise of its primary jurisdiction.[3]

Accordingly, based on the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's motion to stay proceedings and refer this matter to the Interstate Commerce Commission is granted, and the question whether the actions of INF, Ltd. constitute an unreasonable practice is referred to the Interstate Commerce Commission.

2. The parties shall promptly take all actions necessary to place this question before the Interstate Commerce Commission.

3. The Clerk of Court shall deliver a copy of this order to the Interstate Commerce Commission.

Dated: January 30, 1987

/s/ DIANA E. MURPHY
United States District Judge

[3]The court's determination that the interpretation of the applicable tariff and the issue of operating authority are not within the ICC's primary jurisdiction does not, of course, presume that the ICC will not address these issues in reaching the question referred.

APPENDIX E

INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-C-30041

INF, LTD. — PETITION FOR DECLARATORY ORDER

Decided: February 23, 1988

INF, Ltd. filed a petition on April 27, 1987, requesting an order determining which tariff was properly applicable to certain transportation of aluminum items by INF, for Spectro Alloys Corp. In December 1984, INF's parent corporation ordered it to cease all operations. The parent simultaneously filed for reorganization under Chapter 11 of the Bankruptcy Code. Auditors reviewed INF's records and concluded that it had charged an incorrect rate for 124 shipments, *i.e.*, a rate for "iron and steel" rather than a higher rate for "freight, all kinds." INF then filed suit in State court to collect undercharges in the amount of $22,460.70.

The case was removed to the United States District Court for the District of Minnesota, Fourth Division, where it is now pending as Civ. No. 4-86-705. Noting the possible relevance of our action in *Buckeye Cellulose Corp. v. L&N R.R. Co.*, 1 I.C.C.2d 767 (1985) *(Buckeye)*, *aff'd sum nom. Seaboard System Railroad v. United States*, 734 F.2d 635 (11th Cir. 1986) *(Seaboard)*, and *NITL — Pet. to Inst. Rule on Negotiated Motor Cer.*, 3 I.C.C.2d 99 (1986) *(Negotiated Rates)*, which indicated our intention to use our authority to determine what is "reasonable," the court

referred to us the question whether INF's action constitutes an unreasonable practice. *See INF, Ltd. v. Spectro Alloy Corp.*, 651 F. Supp. 1405, 1407-08 (D. Minn. 1987) *(Referral)*.

PRELIMINARY MATTERS

While *Referral* indicates that an issue concerning INF's authority has been raised in court, the pleadings before us do not raise this issue.[1] Should the court require further interpretation of INF's authority, we will provide one upon request.

Spectro also asserts that several of the shipments involved here moved more than 3 years before the legal action began and therefore are barred from consideration by the

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[1]Commission records show that INF held common carrier authority under the name "I.N.F. Ltd." in No. MC-153601 (Sub-No. 7) to transport metal products nonradially between points in 23 States. The certificate was issued September 14, 1982, and was revoked with all of the carrier's other authority on July 11, 1985. Petitioner's evidence indicates that the movements occurred between April 1983 and December 1984. However, INF's president's (Mr. Freese) statement of August 6, 1987, included with respondent's reply statement, claims that Spectro was billed between February 1982 and December 1984 for movements of the involved commodities.

This authority was granted pursuant to *Acceptable Forms of Requests For Operating Authority*, 364 I.C.C. 432 (1980), which established the use of the broad commodity descriptions of the Standard Transportation Commodity Code. The metal products commodity description in INF's Sub-No. 7 certificate encompasses the aluminum products involved here. INF's pertinent tariffs implementing the rates under either a previous certificate or MC-153606 (Sub-No. 7), were effective between September 2, 1982 and May 1, 1983. If INF did provide service to Spectro under its Sub-No. 7 certificate before September 14, 1982, it did so without authority from the Commission. It is well settled that carriers are not entitled to recover undercharges if the carriage is unauthorized or illegal. This principle is applied even if there was a tariff on file by the carrier for a service it did not have authority from the Commission to offer. *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (1980) citing *St. Louis Southwestern Ry. Co. v. Garvey Elevator, Inc.*, 505 F.2d 625 (5th Cir. 1974); *Mars Express, Inc. v. David Masnik, Incorporated*, 401 F.2d 891 (2nd Cir. 1968), and *Nyad Motor Freight, Inc. v. W.T. Grant Company*, 486 F.2d 1112 (2d Cir. 1973).

limitation provided in 49 U.S.C. 11706. This matter is easily determined by the court. Thus, we will not consider this issue further.

While Spectro makes no formal motion to strike, it claims that petitioner's initial statement was not verified. It suggests that this undermines the strength of INF's claim and constitutes merely argument. We note, however, that the statement filed by petitioner with the Commission on July 14, 1987, pursuant to our procedural order served May 27, 1987, was properly verified as specified by our rules at 49 CFR 1112.6.

BACKGROUND

INF, through its president, Melvin Freese, solicited business from Spectro. Spectro, a metal products manufacturer, was already using other carriers to haul its aluminum and aluminum alloy traffic at satisfactory rates. Mr. Freese was informed either by Mr. Stan Popovich, Spectro's traffic manager, or his assistant (and eventual successor), John Keller, or both, that the commodities being shipped were aluminum, aluminum alloys, aluminum scrap, and aluminum ingots. He was informed of the rates existing carriers were charging Spectro for this freight. Thereafter, Mr. Freese returned to Spectro's representatives and quoted a mileage commodity rate based on an "iron and steel" tariff in ICC INFL 202[2] that either matched or was lower than the other rates being paid. It is unclear whether Mr. Freese

[2]INF's tariff ICC INFL 202 item 1500 names specific commodity rates from Lakeville and Twin Cities, MN to a number of specifically named destinations in the surrounding States. This provision applies on iron and steel and also metals group. The term "metals group" is broad enough to encompass the aluminum articles in question. The parties have not provided us with the origins and destinations for the involved shipments to enable us to determine if item 1500 applies to any of the shipments. In any case, neither is relying on item 1500. Therefore, we will assume it is not applicable. On the other hand, item 2000 names distance rates on iron and steel and a number of other articles, but none of the other articles could be interpreted to include aluminum articles.

informed respondent's representatives of the exact tariff he was quoting from, but they did know that he was basing his rates on a tariff that INF had on file. Based on the assurances by Mr. Freese that the quoted commodity distance rate based on the "iron and steel" tariff would apply to the involved shipments, respondent tendered 124 shipments to petitioner. The shipments moved between April 1983 through December 1984.

INF avers that Spectro was originally billed at distance rates in tariff ICC INFL 202 (apparently item 2000) which were published to apply to "iron and steel" products. The corrected freight bills were based on charges from tariff ICC INFL 202 item 3000 which were published to apply to "freight, all kinds." INF claims that, since respondent shipped scrap aluminum and aluminum alloys which are not iron or steel, and there is no specific rate published to apply on the involved commodities, the freight all kinds rate must apply. Petitioner states that the tariff was always available to Spectro for examination.

INF argues that 49 U.S.C. 10761(a) requires a carrier to collect its tariff rate. Additionally, it avers that section 10761(a) is explicit that the only rate petitioner can charge is in its tariff on file with the Commission. Relying on *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915), and a long line of court and Commission precedent commonly called the "filed rate doctrine," INF argues that the applicable tariffs are considered incorporated in the contract between the shipper and the carrier, that the tariff is a legal rate between the parties that they cannot modify, and that the shipper is presumed to know the tariff rate.

INF acknowledges that equitable defenses are now considered by the Commission. However, it argues that the

equitable defenses allowed by *Negotiated Rates* and *Buckeye* are not applicable here because Mr. Freese quoted an INF published tariff rate, not an unpublished rate, and there was no agreement negotiated to use any other rates. Additionally, it asserts that any reliance by Spectro on Mr. Freese's rate quotations was not reasonable since Spectro knew better than anyone that its product was aluminum and not "iron or steel."

In reply, Spectro claims that INF's argument that section 10761(a) requires it to collect the tariff rate is invalid. Spectro claims that the evidence shows that it believed INF's president, Mr. Freese, relied upon his representations, and would not have tendered the traffic to INF otherwise. Furthermore, it asserts that, since the facts show that INF and Spectro contracted to transport the traffic on the basis of the rates and charges already paid and there was no complaint or dissatisfaction voiced by INF until years later, the contract is proved by the undisputed testimony and freight bills.

Spectro claims that the undisputed facts show that the parties contracted that the rates assessed and charged would and should apply to its aluminum products shipments. It claims that assessment of substantially higher "freight all kinds" rates at this late date would be unreasonable and would constitute unjust enrichment for INF. Spectro claims that this is proven by INF's former president who declares that the "freight, all kinds" rates were not designed to be competitive, that he knew that aluminum products were being shipped and that INF has already received all it intended to have and all it is entitled to. Mr. Freese also stated that INF would not have handled the traffic if such rates had not been agreed to and applied to

the shipments involved. Spectro avers that to renege on this agreement at this date is a deceptive practice, is in bad faith, and borders on fraud. It believes this is a classic case for application of the Commission's power to rule that collection of undercharges constitutes an unreasonable practice. Spectro requests that we find that the rates originally assessed and paid are the legal applicable rates and that INF's attempt to collect undercharges based on these shipments is an unreasonable practice.

DISCUSSION AND CONCLUSIONS

1. *Equitable defenses in rate applicability cases.* Our recent decisions in *Buckeye* and *Negotiated Rates* hold that section 10701(a) and section 10704 give us the authority to consider all the circumstances surrounding an undercharge suit. In *Negotiated Rates* we found that: (1) in the post-Motor Carrier Act of 1980 environment the filed rate doctrine does not necessarily bar equitable defenses; and (2) where, as here, an undercharge claim is filed by a carrier in court and the court refers the case to the Commission for determination of availability of equitable relief, the Commission will decide whether, under all the relevant circumstances, collection of undercharges would be an unreasonable practice. In *Wakefern Food Corp. v. Southwest Frgt. Lines, Inc.*, 3 I.C.C.2d 814 (1987) *(Wakefern)*, we determined that an advisory opinion in favor of the shipper under the *Negotiated Rates* precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper could legitimately rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the quote.

2. *Application of equitable defenses to this case. Negotiated Rates* was intended to temper the harsh effects of the filed rate doctrine when it could be shown that the shipper and carrier negotiated and agreed on a rate that was not published in a tariff. Such a showing has elements of contract law, *e.g.*, offer, acceptance, reliance, etc. The focus of our inquiry is, therefore, the negotiations between the parties, and their actions and beliefs.

INF faults Spectro for failing to discover that the billed rates, based on "iron and steel" rates instead of the "freight all kinds" rates, did not conform to effective governing tariff rates assertedly applicable to aluminum items, and it argues that this failure precludes Spectro from escaping responsibility for the undercharges. INF contends that Spectro had ready access to the actual tariff underlying the rate quotations made by INF's president. It could have demanded a copy from the carrier or obtained a copy from the Commission or from any number of tariff watching services. Instead, Spectro chose to do business on the strength of personal conversations with the carrier's president. That business judgment, INF argues, does not warrant relief from the obligation to pay lawful tariff charges.

We have addressed similar arguments before. In No. MC-C-10983, *Fort Howard Paper Company v. Maislin Industries, U.S. Inc., et al.* (not printed) served August 12, 1987, as corrected by notice to the parties served August 28, 1987, slip op. at 5, we noted that the shipper not only subscribed to tariff services but also had copies of the carrier's actual tariffs on hand. Nevertheless, we found that this did not negate the existence of a negotiated rate, nor did it preclude us from applying in that situation the policy announced in *Negotiated Rates*. Additionally, in No. MC-C-30032, *Mitchell Milling Co., Inc. — Petition for Declara-*

tory Order (not printed), served October 22, 1987, slip op. at 3, we found not necessarily controlling the fact that the shipper admitted to an ignorance of tariff filing requirements, although we decided it would be considered in weighing the equities. *See also* No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S. Inc., et al.* (not printed), served January 19, 1988. Under the facts of this case, we see no reason to depart from that reasoning.

The evidence here discloses that INF's president solicited the traffic and quoted what he knew to be a competitive rate for the traffic. Spectro accepted and paid for the transportation services at the quoted rates. Spectro relied on INF to implement properly the quoted rates. INF's failure to do so, despite Spectro's lack of vigilance, should, in these circumstances, preclude INF's later collection of undercharges. There is absolutely no evidence that Spectro agreed to pay any more than the amount INF originally quoted and billed for each shipment. There is no evidence that INF ever demanded additional amounts over the amounts it billed at any time during its business relationship with Spectro. The carrier's president at the time of the negotiations and transportation clearly states that the traffic could not have moved competitively under the freight all kinds rates. We find that Spectro reasonably believed that the amounts quoted and billed by INF were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Spectro and INF, and that, since full payment was made by Spectro, INF is equitably entitled to collect no more.

3. *Summary.* The evidence here shows that INF's president, Mr. Freese, quoted rates to Spectro in order to induce it to tender the aluminum traffic and Spectro agreed to tender its aluminum shipments at those rates. Spectro,

moreover, reasonably relied on Mr. Freese and his quotation in view of the fact that he was the firm's top management official. It would be inequitable to ignore proven rate negotiations and Spectro's reasonable reliance on the assurances of INF's president simply because inflexible adherence to the "filed rate doctrine" would suggest otherwise. In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Spectro to pay undercharges for the difference between the negotiated rates and the tariff rates.[3]

This action will not significantly affect either the quality of the human environment or energy conservation.

We find:

It is an unreasonable practice for petitioner INF to collect the alleged undercharges for the shipments described in this proceeding.

It is ordered:

1. This proceeding is discontinued.

2. A copy of the decision will be mailed to the United States District Court for the District of Minnesota, Fourth Division.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Chairman Gradison and Commissioner Simmons dissented with separate expressions.

Noreta R. McGee
Secretary

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[3]While in *Negotiated Rates* we made it clear that it would be unreasonable to require shippers to determine, prior to each transportation movement, whether the agreed rate is actually on file, we did not eradicate the doctrine that the rate filed is a matter of public record and that the shipper is charged with constructive notice of the actually filed rate. In situations such as these, we are balancing the equities to determine whether, under the circumstances, adherence to the filed rate doctrine would lead to an unreasonable result.

CHAIRMAN GRADISON, dissenting:

In the numerous cases the Commission has reviewed in the past year involving our *Negotiated Rates* policy, we have seen many instances where shippers have been either misled by carriers or had quite reasonably assumed that the carriers would fulfill their obligations to file applicable tariffs conforming to negotiated rates. I have generally been sympathetic to the shipper's position when it is demonstrated that it *reasonably* relied on the carrier's explicit or implicit representation that freight tendered to the carrier would be hauled under legally applicable (*i.e.*, filed) tariffs. This case goes too far. In my view, as long as the Commission is obligated to give some meaning to the anachronistic "filed rate doctrine," shippers must be held to a higher standard of reliance than shown here.

My problem with the shipper's position here is that not only did the parties agree to a mileage commodity rate *based* on an "iron and steel" tariff in ICC INFL 202, they appear to have agreed that the tariff itself would apply. The shipper knew that the tariff existed and was assured that it would be the basis of the charges. The record is devoid of any intimation that subsequent carrier action was contemplated to make the rate level legally effective through publication. The record simply does not establish that the carrier quoted a rate other than a filed tariff rate. Accordingly, the question is whether it was reasonable, under the limited circumstances in *Buckeye*, for the shipper to have relied on the carrier's interpretation of a filed tariff. I think not.

In this case, one question of interpretation exists — do aluminum alloy products qualify as iron or steel articles

for rate purposes? There is no reasonable argument that an iron and steel tariff applies to aluminum articles. As an established aluminum shipper with experienced personnel in its traffic department, Spectro has little leeway to claim innocence when it comes to interpretation of such matters. Accordingly, I find that its equitable defenses must fail here. I hasten to add, however, that if agreement on the applicability of the tariff itself was not at issue, but only the rate level with contemplated future action by the carrier to legally conform that rate, my position would be different.

What this case and others suggest to me is that the time has long passed for wholesale legislative reconsideration of the filed rate doctrine. It is quickly becoming apparent that even with the requirement that *Negotiated Rates* cases must first be referred to the Commission by a court, our docket is in danger of being crowded with complaints and requests for declaratory orders. Further rulemaking is not the answer because the facts of each case require individual attention. And the cases are getting more difficult to decide. In today's transportation marketplace, Commission involvement in what are basically contractual disputes between commercial entities appears increasingly unnecessary. Given that the antidiscrimination purposes behind the filed rate doctrine seem more and more irrelevant in a largely deregulated marketplace, it is time for the Congress to recognize the damage being caused by the filed rate doctrine. We need legislation in this session to alleviate this unnecessary, time consuming and expensive situation.

COMMISSIONER SIMMONS, dissenting:

Based upon the facts introduced in evidence, I cannot find that this case falls under the precedent established in Ex Parte No. MC-177, *Negotiated Rates* and in *Buckeye Cellulose Corp. v. L&N R.R. Co.*, 1 I.C.C. 2d 767 (1985) In my view, this case involves a simple issue of tariff interpretation — do aluminum alloy products qualify as iron or steel articles for rate purposes? The Commission has over the years been called upon to review and determine which of the published tariffs should apply to a particular shipment. Tariff interpretation has long been a function of the Commission.

On the other hand, our discussion during the Ex Parte MC-177 proceeding centered upon the abusive practice of carriers quoting rates to shippers without publishing those rates with this Commission. Shippers and this Commission were concerned not with issues of tariff interpretation, but rather how to best deal with situations when a carrier attempts to collect undercharges based on rate never filed. Here, the critical difference is that the carrier misquoted and applied the wrong tariff for the shipments, namely, the rate for iron and steel as opposed to aluminum alloy. No evidence was presented that the carrier had deliberately quoted unpublished rates with no intention of ever placing them on file in order to induce the shipper to use its services, In my view, the precedent of *Negotiated Rates* was never intended to be applied so broadly as to cover a rare misquotation of a filed rate.

Moreover, I fail to see how the equitable defenses identified in *Buckeye* apply here. The circumstances between *Buckeye* and this case are profound enough to warrant

a ruling in favor of the carrier. In *Buckeye,* we determined that the shipper's good faith reliance on the carrier's long term rate misquotation, coupled with periodic reassurances by the carrier, should not bind the shipper to the harsh effects of the filed rate doctrine. In this case there was *one* misquotation by a carrier official concerning the applicability of a published tariff. There was no lengthy pattern of misinterpretation as there was in *Buckeye.* In *Buckeye,* the shipper continued to check with the carrier regarding the applicable rate, and was assured on every occasion that its interpretation was correct.

Reviewing this case as one of tariff interpretation, I cannot find that the shipper could reasonably rely on INF's statement that the iron and steel tariff applied. The meaning of the term "iron and steel" is plain to the ordinary user. In these cases, we should expect some reasonable behavior on the part of the shipper. No reasonable shipper could maintain that an iron and steel tariff applies to aluminum articles. The shipper had a reasonable duty to ascertain the specific tariff the carrier was quoting as well as its applicability to its products once it was put on notice by the carrier that an iron and steel tariff would apply.

I would like to make clear that the equitable defense established in *Negotiated Rates* was never designed to impair the filed rate doctrine. This doctrine has worked very well before the Motor Carrier Act of 1980 and afterwards. Under this system, all parties are put on notice as to what the proper transportation charges for specific commodities will be. It has helped prevent carrier discrimination in rates and services between large and small carriers. Shippers take advantage of this system to shop around for the best rate and service as well as demand discounts. As the Com-

mission has stated, the rulemaking in Ex Parte No. MC-177 was only intended to temper the harsh effects of the filed rate doctrine when it could be shown that the shipper and carriers negotiated and agreed on a rate that was *not* published in a tariff, and a *reasonable* shipper could rely on such quotation. The Commission cannot eradicate the doctrine that a filed rate is a matter of public record and that the shipper is charged with constructive notice of the actually filed rate.

APPENDIX F

U.S. Court of Appeals Cases Involving the Negotiated Rates Issue

U.S. COURT OF APPEALS — CASE NAME — STATUS

First Circuit — *Delta Traffic Service, Inc., et al. v. Transtop Incorporated;* No. 89-1662 ..... Pending

Second Circuit — *Delta Traffic Service, Inc., et al. v. Appco Paper & Plastics Corp.*, No. 88-9057 . Pending (Argued 8/17/89)

Third Circuit — *Branch Motor Express Company v. Caloric Corp.;* No. 89-1130 ..... Pending (Argued 6/27/89)

Fourth Circuit — *Langdon M. Cooper, Trustee, et al. v. Delaware Valley Assoc.;* No. 89-3259 . . Pending (Argued 12/7/89)

Fifth Circuit — *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989) . . Decided 2/2/89; Pending on petition for Writ of Certiorari in in No. 88-1958

Sixth Circuit — *James B. Orr and Highway Express, Inc. v. Sewell Plastics, Inc. and the Interstate Commerce Commission;* Nos. 89-5108, 89-5110 ..... Pending (Argued 11/13/89)

Seventh Circuit — *Orschelin Bros. Truck Lines, Inc. v. Zenith Electric Corporation;* Nos. 89-1329, 89-1330 ..... Pending

Eighth Circuit — *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.;* No. 88-2267 ..... Decided 7/17/89;

Pending on Petition for Writ of Certiorari, in No. 89-624 *INF, Ltd. v. Spectro Alloys Corp.;* No. 88-5324 . Decided 8/3/89;

Pending on Petition for Writ of Certiorari

Ninth Circuit — *Delta Traffic Service, Inc., et al. v. Weyer-Hauser Co.;* No. 89-35115 ..... Pending

(Argued 10/3/89)

Eleventh Circuit — *Feldspar Trucking Co., v. Greater Atlanta Shippers Association, Inc.;* No. 89-8450 ..... Pending

Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, CLERK

No. 89-936

In The

Supreme Court of the United States

October Term, 1989

INF, LTD.,

Petitioner,

v.

SPECTRO ALLOYS CORP.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

When the Interstate Commerce Commission, pursuant to a referral order from a district court as a matter within the Commission's primary jurisdiction, rules that it would be an unreasonable practice to require a shipper to pay to a motor carrier as undercharges the difference between the tariff charges and those negotiated by the parties and reasonably relied upon by the shipper, and there is no claim that the Commission's ruling was arbitrary, capricious, or not supported by substantial evidence, may the district court nevertheless disregard the Commission's ruling, and require the shipper to pay the undercharges?

LIST OF PARTIES

Appellant below was Spectro Alloys, Corp., a Minnesota corporation, the shipper. Appellee was INF, Ltd., a Minnesota based motor carrier and a subsidiary of Indianhead Truck Line, Inc., a Wisconsin corporation.

TABLE OF CONTENTS

Page

Restatement of Question Presented For Review i

List of Parties i

Table of Contents ii

Table of Authorities iii

Opinions of Courts and Administrative Agency Below 1

Jurisdiction 1

Statutes Involved 2

Restatement of the Case 2

Argument 4

A. Summary 4

B. The Ruling Below is Entirely Consistent With Prior Rulings Of This Court 5

C. No Showing of Irreconcilable Conflict Is Made 8

D. The Opinion Below Is Totally In Harmony With The Intent Of The Motor Carrier Act of 1980 9

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES:

American Trucking Ass'n Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397 (1967) 10

Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800 (1973) 10

General Am. Tank Car Co. v. El Dorado Terminal Co., 308 U.S. 422 (1940) 6

Hewitt-Robins Inc. v. Eastern Freight-Ways Inc., 371 U.S. 84 (1962) 8

Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 (1915) 5

Maislin Industries, U.S. Inc., v. Primary Steel Inc., 879 F.2d 400 (8th Cir. 1989 pet. for cert. pending) 4, 6, 7, 8

Matter of Caravan Refrigerated Express, Inc., 864 F.2d 388 (5th Cir. 1989 pet. for cert. pending) 8

Missouri Pac. R.R. v. Rutledge Oil Co., 669 F.2d 557 (8th Cir. 1982) 6

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 6

Paulson v. Greyhound Lines, Inc., 804 F.2d 506 (8th Cir. 1986) 6

Petition to Inst. Rulemaking on Negotiated Motor Common Carrier Rates, 3 ICC 2d 99 (1986), 5 ICC 2d 623 (1989) 10

Seaboard System R.R. v. United States, 794 F.2d 635 (11th Cir. 1986) 8, 10

Square D Co. v. Niagara Frontier Traffic Bureau, 476 U.S. 409 (1986) 5

TABLE OF AUTHORITIES – Continued

Page

T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) 6

United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956) 6

Western Transp. Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir. 1982) 7, 9

STATUTES AND REGULATIONS:

Interstate Commerce Act

49 U.S.C. 10701 ..... 2, 6

49 U.S.C. 10701(a) 4, 5, 8

49 U.S.C. 10761 2

49 U.S.C. 10761(a) 4

The Motor Carrier Act of 1980 ..... 5, 9, 10

OPINIONS OF COURTS AND ADMINISTRATIVE AGENCY BELOW

The August 5, 1989, opinion of the United States Court of Appeals for the Eighth Circuit here sought to be reviewed is reported at 881 F.2d 546, and appears at Pet. A-1. The September 15, 1989, order of the United States Court of Appeals for the Eighth Circuit denying rehearing is unreported, but appears at Pet. A-10.

The Memorandum Opinion and Order of the United States District Court, District of Minnesota, of July 8, 1988, dealing with the parties' respective summary judgment motions after referral is reported at 690 F. Supp. 808, and appears at Pet. A-11.

The February 23, 1988, Order of the Interstate Commerce Commission in its Docket MC-C-30041, *INF LTD. – Petition For Declaratory Order* upon referral is unreported but appears at Pet. A-24.

The January 30, 1987, Order of the United States District Court, District of Minnesota, in its Civil No. 4-86-705, referring the question to the Interstate Commerce Commission is reported at 651 F. Supp. 1405, and appears at Pet. A-17.

JURISDICTION

The jurisdictional requisites are asserted in Pet. 2.

STATUTES INVOLVED

49 U.S.C. 10701 Standards for Rates, Classifications, Through Routes, Rules, And Practices

> (a) A rate (other than a rail rate) classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. . . .

49 U.S.C. 10761 Transportation Prohibited Without Tariff

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

RESTATEMENT OF THE CASE

INF, an ICC certificated motor carrier, performed certain transportation services for Spectro in 1983 and 1984 assessing therefore charges which ICC later found to have been negotiated between Spectro and INF's president, its top management official who was then soliciting traffic other motor carriers were handling, and which negotiated rates Spectro relied upon in tendering the

traffic to INF, there being competitive alternatives available to Spectro. INF did not file with ICC a tariff containing the negotiated rates, but contemporaneously billed Spectro for and received compensation in accordance with the negotiated rates (Pet. A-31-2). In 1986 INF commenced a lawsuit against Spectro for $22,500.00 representing as asserted undercharges the difference between what INF charged and received and what its filed tariffs would have called for.

The United States District Court for the District of Minnesota granted Spectro's motion to refer to ICC as a matter within its primary jurisdiction the question of the reasonableness of the practice of requiring INF to pay such undercharges in the circumstances (Pet. A-23). The parties submitted their respective views of the facts and the law to ICC which found that in this instance, it is an unreasonable practice for INF to collect the alleged undercharges (Pet. A-32).

Upon motions by both parties, the district court granted INF's motion for summary judgment, and denied that of Spectro (Pet. A-16). No assertion was made by INF that ICC's ruling was arbitrary, capricious, or not supported by substantial evidence, nor did INF seek review of ICC's ruling as such, asserting instead that as a matter of law the district court could not do otherwise according to the filed rate doctrine.

Upon appeal by Spectro, the United States Court of Appeals for the Eighth Circuit ruled that since the district court erred in holding that it was bound by the filed rate doctrine and could not accept ICC's decision, and no

other issue was raised than this legal question, the district court's order granting INF's summary judgment motion had to be reversed and the matter remanded to the district court with instructions to grant Spectro's summary judgment motion (Pet. A-9). This remand has since been complied with, the judgment for INF vacated, and judgment for Spectro with costs against INF entered by the district court.

ARGUMENT

A. Summary

The Court of Appeals committed no error in deciding as it did (in conjunction with its decision in *Maislin Industries, U.S. Inc., v. Primary Steel Inc.*, 879 F.2d 400 [8th Cir. 1989], pet. for cert. pending, argued the same day) that since such matters as the reasonableness of a carrier's billing practices and efforts to collect undercharges are matters involving the special expertise of ICC and are therefore within its primary jurisdiction, the district court erred in holding that it must nevertheless require Spectro to pay the undercharges sought under the filed rate doctrine, and that since only this legal question was before the court (there being no issue as to whether the ICC's ruling was arbitrary, capricious, or not supported by substantial evidence) summary judgment for Spectro is required.

The proper authority to harmonize the provisions of the Interstate Commerce Act, 49 U.S.C. 10701(a) requiring that carrier practices be reasonable, and 49 U.S.C. 10761(a) requiring that tariff rates be assessed, is the

Commission. In this instance, as in *Maislin*, the Commission properly resolved the two statutory provisions by holding that the collection practices of this carrier were unreasonable.

In asserting otherwise, petitioner argues (1) that the decision below conflicts with prior decisions of this court, (2) that the federal courts are irreconcilably split, and (3) that the decision below is in conflict with the intent of the Motor Carrier Act of 1980. INF does not argue here that the referral order issued by the district court was erroneous, or that the Commission's order was capricious, arbitrary, or not supported by substantial evidence. These points will be addressed below.

B. The Ruling Below Is Entirely Consistent With Prior Rulings Of This Court

Petitioner asserts that *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) requires that "[d]eviation from [a filed rate] is not permitted upon any pretext." (Pet. 10.) Petitioner omits, however, the portion of the cited passage which completes the sentence: "unless it is found by the Commission to be unreasonable". The omission is significant since the decisions of this court upon which petitioner relies do not include any in which the Commission has considered and ruled upon the reasonableness of a carrier's rates or practices pursuant to its authority to do so under 49 U.S.C. 10701(a). Thus, *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) involving the question whether anti-trust sanctions may lie against carriers or their rate bureau with respect to filed rates allegedly arrived at in restraint of trade,

does not reach the question of rates or practices held by the Commission to be unreasonable. Similarly the Eighth Circuit cases relied upon by petitioner, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986) and *Missouri Pac. R.R. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982) involving claims to the *court* of improper behavior by the carriers, did not invoke questions of unreasonable carrier practices as determined by the *Commission* under the Interstate Commerce Act.

It is asserted that the Commission has no power to waive undercharges according to *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). This in no way mitigates against the ruling below because the Court of Appeals carefully observed the proper balance of responsibility between the courts and the Commission under the provisions of the Interstate Commerce Act. Section 10701 grants the Commission, and not the courts authority to determine reasonableness under such circumstances as a matter within the Commission's primary jurisdiction. *Maislin Industries, U.S. Inc., v. Primary Steel, Inc.*, supra, *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65 (1956), *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-306 (1976), and *General Am. Tank Car Co. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-432 (1940). This function is strictly one for the Commission to perform, and courts have no role to play in this phase.

Having done so, however, it is not the Commission but the court which has the power and the responsibility to accept the Commission's advice in the matter and then to enforce the Commission's ruling, unless it is persuaded that the Commission acted capriciously, arbitrarily, or that there was no substantial evidence to support what

the Commission did, a matter as to which there is no issue here. As was noted by the Court of Appeals in *Maislin*, supra, 879 F.2d at 405, *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982) aptly illustrates the interaction between the Commission and the courts when questions of collection of motor carrier rates and reasonableness of carrier rates or practices are involved. The shipper wishing to have a determination of unreasonableness, should ask the court for a referral of the reasonableness question to the Commission, and the court, after having received the Commission's advice, may subsequently grant relief to the shipper.

Petitioner asserts that the sole remedy available to the shipper is to pay the higher charges, and then begin a civil action for reparations, which then may call for a Commission referral. While such may be one means, it is not at all the only way for a shipper to secure relief. In fact, in such a case as this, a shipper would be badly advised to select such a course of action because he would have paid in funds to a carrier which would be unable to refund them should the shipper ultimately prevail in his reparations action since the carrier is defunct, and is the subsidiary of a bankrupt entity. If such were the only procedure available, the procedure would have destroyed the remedy. In *Western Transp. Co.*, supra, the Seventh Circuit certainly approved of the same sort of procedure that was followed here, that of seeking a referral to the Commission of the reasonableness question after being sued for undercharges.

Petitioner suggests that such referral procedures are available only as to questions of rate reasonableness, not practice reasonableness. This court approved of having a

claim of past practice unreasonableness be referred to the Commission in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962). The provisions of 49 U.S.C. 10701(a) requiring reasonableness as to motor carrier rates and practices are found in the same sentence without differentiation. There is no rational basis upon which to differentiate them.

C. No Showing Of Irreconcilable Conflict Is Made

Petitioner's only suggestion of conflict within the Courts of Appeal refers to the Fifth Circuit's opinion in *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (5th Cir. 1989 pet. for cert. pending) and the Eighth Circuit decisions in this and the *Maislin* opinion, supra. The *Caravan* matter differs from the Eighth Circuit decisions in that *Caravan* did not involve a Commission decision upon a referred reasonableness question. The instant controversy presents the narrower question what the district court should do after having secured the advice it sought from the Commission. *Caravan* does not involve that question. While the shipper in *Caravan* may have believed he should have been given a referral order, such is not the issue in the matter at hand.

A more meaningful recitation of the harmony of the Circuit Courts of Appeal would include *Seaboard System R.R. v. United States*, 794 F.2d 635 (11th Cir. 1986) in which the Eleventh Circuit held it to be correct for the Commission to review and rule that it would be an unreasonable practice for a carrier to attempt to collect charges based on an unambiguous, although unclear, tariff, and for a court to rule subsequently that such undercharges should

not be collected. Also omitted by petitioner is *Western Transp. Co.*, supra, in which the Seventh Circuit held that if a shipper, sued for undercharges, complains that in this instance, the imposition of a "shipper's load and count" notation requirement in order to qualify for a lower rate was unreasonable, the court should refer the question to the Commission for its determination of the question.

The inclusion of these Eleventh and Seventh Circuit decisions which are totally in harmony with the Eighth Circuit decisions here involved shows a lack of conflict between the circuits.

Petitioner also points to various district court decisions in some of which referral orders were issued, and in others denied. There are such different results, but some fact situations may not present appropriate cases for referral of the reasonableness question, perhaps, for example, because the initial submission to the court did not present a strong enough case of the existence of such a question to warrant referral. There may be cases as to which no referral order should be granted even though primary jurisdiction in the Commission to determine such reasonableness questions is recognized.

D. The Opinion Below Is Totally In Harmony With The Intent Of The Motor Carrier Act of 1980

Petitioner argues that the decision below conflicts with the intent of the Motor Carrier Act of 1980. In doing so petitioner seems to argue from legislative history that Commission discretion was eliminated by that statute. Such can hardly be the case.

In *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) this court held:

> . . . the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

It can hardly be thought that the passage of the Motor Carrier Act of 1980 was supposed to change the Commission's role as a regulatory agency in such a manner as to render it unable to react to changing conditions and circumstances and to be forever bound to maintain its old policies and rulings until such time as Congress may see fit to change the Act. A Commission so bound would be of little use to serve the Nation's needs.

When the Commission departs from its settled precedent, it must explain its departure in a manner sufficient to permit judicial review of its policies, *Seaboard System R.R., Inc. v. United States*, supra, 794 F.2d at 639, *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). No claim is made that the Commission has failed to do so. See *Petition to Inst. Rulemaking On Negotiated Motor Common Carrier Rates*, 3 ICC 2d 99 (1986), 5 ICC 2d 623 (1989). The changed competitive circumstances in the transportation industry and the corresponding lessening in importance of the likelihood of discrimination in the absence of formerly existing

monopolistic conditions, and the need in the public interest for the Commission to be able to adjust to such changed conditions are too well documented and understood to warrant further discussion.

CONCLUSION

The petition fails to show with the sufficiency required why the United States Supreme Court should undertake review of the Court of Appeals' decision. Its opinion is well founded in law, and does not conflict with those of other Circuit Courts of Appeal. The result of the decision below is fair and consistent with the realities of today's transportation circumstances, and satisfactorily enables the Interstate Commerce Commission to perform its role as a regulatory agency dealing with current events and economic conditions in the Nation's interest. The petition should be denied in its entirety.

Respectfully submitted,

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